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No. 251

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IN THE

Supreme Court of the United States

October Term, 1960

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTNG AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO.; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

MOTION OF APPELLEES TO DISMISS

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Plaintiff-Appellant,

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Defendants-Appellees.

No. 251
October
Term
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ON APPEAL FROM THE

SUPREME COURT OF THE STATE OF ARIZONA

MOTION TO DISMISS

Appellees move, pursuant to Paragraph 1(b) of Rule 16 of the Revised Rules of this Court, that the appeal be dismissed on the following grounds: (a) it does not present a substantial federal question, (b) the federal question sought to be reviewed was not timely or properly raised or expressly passed on, and (c) the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE

I. Introduction

In the opinion of appellees the nature and theory of appellant's actions below are not adequately disclosed by the Statement of the Case appearing in the Jurisdictional Statement. Appellees, therefore, will at the outset set forth their statement of the case as it was presented to and considered by the Arizona Supreme Court[1].

The appeal grows out of two separate actions[2] involving the premium rates charged by the Industrial Commission of Arizona on self rating workmen's compensation insurance policies issued by the Commission.

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1 Except as otherwise indicated, numbers in parentheses refer to pages of Appellant's Abstract of Record before the Arizona Supreme Court. In addition, the following abbreviations are used throughout: "J. St." for Jurisdictional Statement; "O. B." and "R. B." for Appellant's Opening Brief and Reply Brief, respectively, in the Arizona Supreme Court; "A. B." for Corporate Appellees' Brief in the Arizona Supreme Court.

2 First Action—Cause No. 81797, Superior Court of Maricopa County
Cause No. 6177, Supreme Court of Arizona
Second Action—Cause No. 86889, Superior Court of Maricopa County
Cause No. 6414, Supreme Court of Arizona

In both actions, appellant, the holder of a general class workmen's compensation insurance policy issued by the Commission, purported to bring a class action in the right and on behalf of the Industrial Commission and other general class policyholders against the appellee self rating policyholders, the individual Commissioners and the Commission. By its actions, appellant sought to recover for and on behalf of the Commission money judgments against the self rating policyholders and the individual Commissioners. Appellant also sought to obtain for and on behalf of the Commission certain declaratory relief with respect to the right, title and interest of self rating policyholders in certain insurance reserves maintained by the Commission as well as declaratory relief regarding the formula used by the Commissioners in fixing rates on self rating policies. (3, 4, 53, 63, 66).

II. Proceedings Before Superior Court of Maricopa County

A. *The First Action*

The action was commenced on December 1, 1954. It specifically involved self rater premium rates for each of the years from 1948 through 1953, as well as the formula to be used in computing such rates in the future. (iv, 26, 27).

During the period covered by the complaint, self rater premium rates were determined under a retrospective experience rating plan, hereinafter referred to either as the Experience Rating Plan or the Self Rating Plan (227) (J. St. 9a, 11a). Briefly, this plan may be summarized as follows:

a. It provides for an initial or tentative premium rate at the commencement of each year. At the end of each year the initial rate is subject to retroactive modification upward or downward in accordance with the experience developed during that year. The initial or tentative rate as modified becomes the insured's ultimate or final rate for such year. (Self Rating Plan, § § II, XV, as amended, 219, 226);

b. The premium rate consists of two components: (i) the primary loss[3] portion of the rate, and (ii) a loading charge for expenses of administration and catastrophe and excess losses. During 1948-53, the percentages of the total premium rate represented by such components were as follows: (i) primary losses —76.50%, and (ii) loading charge—23.50%;

c. The retroactive modification process provided for in the plan results in a modification not only in the *amount* of the primary loss component but also in the *amount* of the loading charge. The end result is that the primary loss component reflects the *actual* primary losses occurring during the period and using the 1948-53 percentages represents 76.50% of the ultimate rate; the loading charge then represents 30.72% of the *actual* primary losses, or 23.50% of the ultimate or final rate. (Self Rating Plan, XV, as amended 226-227);

d. The Commission may also increase or decrease retroactively for such year the *excess* limit as well as the *percentage* of loading. (237, 238, 239).

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3 Primary losses are losses up to a specified amount per accident. The amount, e.g., $17,500.00 during 1948-53 is referred to as the excess limit. That portion of every loss over the excess limit is known as a "catastrophe or excess loss." If it be assumed that one accident in that same period resulted in a total loss of $20,000.00, $17,500.00 would be considered a "primary loss" and $2,500.00 as a "catastrophe" or excess loss. (226).

Appellant's actions did not involve the primary loss component of the self rater premium rate. By its action appellant contended, however, that the *loading charge* was excepted from the operation of the Self Rating Plan, and that under the terms of the self rating statute (ARS § 23-983E)[4] and the self rating policy the Commission was required to fix the *loading charge* on self-rating policies at 26.32% of manual rates[5] applicable to general class policyholders, (24, 25). This contention formed the basis for appellant's claims for a money judgment and declaratory relief in favor of the Industrial Commission of Arizona[6]. (42, 43, 53, 61-63, 65-66). Appellant's claims were denominated as its Basic Costs Claim and Alternative to Basic Costs Claim, the latter being predicated on a theory of unjust enrichment.

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4 All state statutes referred to herein are set forth in the Appendix hereto.

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5 Manual premium rates are expressed in terms of dollars per $100. of payroll for various job classifications established by the Commission in its rate manual. The manual rate is a prospective rate based upon the probability of loss in the respective job classifications. (14) (ARS § 23-983B, C). The rate cannot be retroactively increased regardless of the actual losses incurred. The policyholder may receive dividends under ARS § 23-986, however, if the Commission deems the loss experience justifies it. See *Industrial Commission. v. Arizona Power Company*, 37 Ariz. 425, 295 Pac. 305, for the comparison made by the court between a self rating and general class policy in interpreting the Self Rating Plan.

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6 Contrary to appellant's elaborate footnote analysis (J.St. 10, 11) purporting to show a $412,262.70 (J. St. 10 n. 15) self rater deficiency in the Catastrophe Reserve, appellant's *complaint* affirmatively establishes that the rates charged for 1948-53 more than covered self rater catastrophe losses. (Loading charge—$1,087,724.34; Catastrophe losses—$1,044,306.24) (41, 60). The complaint contains no allegations that expense items incurred by the Commission under self rater policies were the same amount in *dollars* as incurred under general class policies. It may also be noted that in *State Compensation Insurance Fund v. McConnell*, 46 Calif. 2d 330, 294 P. 2d 440, cited by appellant (J. St. 29) retrospective rating and premium discount plans were adopted as a result of the well recognized fact that expense items are lower in the case of large risks than in the case of small risks.

The Superior Court dismissed the action for lack of jurisdiction over the subject matter. The court held that the complaint constituted a collateral attack upon Commission rate orders and that appellant had failed to pursue and exhaust its administrative remedy before the Commission. (Memorandum Opinion—J. St. 20a-30a)

B. *The Second Action*

The second action was commenced on January 5, 1956, and set forth four causes of action. The first three causes merely constituted a refiling of the first action in its entirety. (255-264). The Fourth Cause purported to be an action for a judicial review of issues raised by appellant in a petition (72-142) filed with the Commission on April 28, 1955. (264-269). Such petition followed a resolution adopted by the Commission on April 1, 1955, revising the self rater formula by raising the excess limit and increasing the percentage of loading charge for the purpose of computing the self raters' ultimate premium rates for 1954. (209). Appellant's petition requested a hearing on the reasonableness and lawfulness of such formula, as well as other practices of the Commission in administering the self rater program and the compensation fund. (73-142).

The second action also raised appellant's so-called Employer's Liability Act Claim[7].

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7 Appellant's statement (J. St. 4, 5, 14) that self raters do not pay for Employer's Liability Act coverage in excess of $10,000/$20,000 limits is incorrect. For the purpose of fixing premium rates on a self rating policy, any loss under the employer's liability endorsement regardless of the amount is treated in the same manner as a compensation loss. The applicable rate is the rate provided in the self rating plan (243).

The Superior Court dismissed the first three causes of action in their entirety and dismissed the Fourth Cause as against the self raters but not as against the Industrial Commission. (J. St. 39a). To the extent that the Fourth Cause purported to seek a judicial review of self rater premium rates, the court held appellant was only entitled to a review of the reasonableness or lawfulness of the Commission's *1954* rate order. (J. St. 32a, 36a). The Fourth Cause of Action as so restricted is still pending in the Superior Court. The judgment of dismissal was based both on procedural and substantive grounds. (Memorandum Opinion—J. St. 31a-36a).

III. Proceedings Before The Arizona Supreme Court

The first and second actions were consolidated on appeal to the Arizona Supreme Court. Appellant stated (J. St. 17) that the Arizona Supreme Court disposed of the case on the merits. That statement is correct. The merits, however, did not, as appellant now attempts to imply, involve any determination with respect to the adequacy, reasonableness or discriminatory nature of the self rater premium rates, or of the classification of self raters as distinguished from general class policyholders. In fact, in presenting its case to the Arizona Supreme Court, appellant disclaimed any intention of attacking the rates and specifically assigned as error[8] the Superior Court's finding that the actions constituted an attack on a rate order. Appellant vigorously asserted that its case was one of contract brought in the right and on behalf of the Industrial Commis-

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8 Assignment No. 1 and Assignment No. 5, O.B. p. 7, 9.

sion (e.g., O. B. pp. 47-48, 65)[9]. It was upon this theory that appellant sought to avoid the procedural and substative grounds for dismissal adopted by the Superior Court—grounds which barred any action attacking the reasonableness and lawfulness of Commission orders unless brought in the manner provided under ARS § § 23-945, 23-946 and 23-947[10].

Finally, in response to appellees' defense that the complaint affirmatively alleged that the self rating policyholders had paid the premiums required under the contract, appellant restated quite clearly the issue presented by its Basic Costs and Employer's Liability Act Coverage Claims:

> "Appellees' 'paid bill' defense (SR Br. 49, 50) turns out to be their 'interpretation' of their 'plan' on the basis of which it is asserted that the self raters have paid 'precisely the amount called for under' the Commission-self rater contract (SR Br. 49). That, of course, is precisely the issue presented by appellant's Basic Costs and Employer's Liability Act Coverage Claims:
>
> *Have the self raters paid 'precisely the amount called for under' the Commission-self rater contract?*" (R. B. 46) (Emphasis supplied)

In resolving this issue, thus "precisely" defined by appellant, the Arizona Supreme Court construed the contract and ARS § 23-983E and found the self

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9 Compare appellant's analysis of its case as set forth in its Opening and Reply Briefs to the Arizona Supreme Court and the Statement of the Case in the Jurisdictional Statement filed with this Court.

10 See Memorandum Opinion of the Superior Court, Second Action, J. St. 32a, 36a.

raters had paid "precisely the amount called for under the Commission-self rater contract." Having so found, it was obvious that appellant's alternative claim based on unjust enrichment must also fail.[11] The court affirmed the judgments of dismissal entered by the Superior Court.

Then, "hoist with his own petar," appellant asserted out of the blue that in rejecting its claims the court had caused a violation of its constitutional rights to due process and equal protection of the laws under the fourteenth amendment. In its Memorandum in support of such Amended Motion, appellant, for the first time in the entire history of the litigation, attempted to raise an issue regarding an alleged unreasonable and arbitrary classification.

The Arizona Supreme Court refused to consider the alleged federal question. Such refusal was predicated on the grounds of estoppel and on the grounds that appellant had an adequate remedy under ARS § 23-946 to obtain a judicial review of acts of the Commission.

ARGUMENT

I. The Appeal Does Not Present A Substantial Federal Question

A. *There can be no federal question presented in this case.*

Appellant's claims as presented to and considered by the Arizona Supreme Court were secondary or deriva-

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11 The court specifically so stated in its Decision on Rehearing (J. St. 17a).

tive in nature.[12] The actions were brought in the right and on behalf of the Industrial Commission of Arizona (1, 4, 255), and sought relief solely for the Commission (53, 63, 258, 260). Therefore, whether or not appellant may assert the unconstitutionality of ARS § 23-983E, or the administrative application thereof, under the fourteenth amendment depends entirely on whether or not the Commission itself would have had that right. *Fahey v. Mallonee*, 332 U. S. 245,; Fletcher, *Cyclopedia of Corporations*, Perm, Ed. Sec. 5859.

The Industrial Commission of Arizona is an agency of the State, created and maintained for the purpose of administering certain of the State's sovereign powers. *Industrial Commission v. Arizona Power Company*, 37 Ariz. 425; 295 Pac. 305.

It is well established that an agency of a state cannot invoke the fourteenth amendment or any other provision of the federal constitution limiting state power. *Pawhuska v. Pawhuska Oil & Gas Company*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; *Risty v. Chicago, R. I. & P. R. Co.*, 270 U. S. 378; *New Orleans v. New Orleans Waterworks*, 142 U. S. 79; *Black River Regulating Dist. v. Adirondack League Club*, 351 U.S. 922, and cases cited: Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 301.

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12 "As has been demonstrated, none of appellant's claims attack an 'order' of the Commission: on behalf of the Commission, appellant seeks enforcement of a contract, collection of a tax, and, alternatively, restitution on the basis of unjust enrichment. *The claims are secondary in nature. The primary right is in the Commission, which refused and refuses to assert them.*" (O. B. 57, 58) (Emphasis supplied) The collection of tax referred to by appellant is not involved in this appeal.

In the *Black River Regulating District* case, *supra*, this Court dismissed an appeal taken from the New York Court of Appeals where the New York court had held as follows:

> "A regulating district charged with authority to carry out the public purpose is an agency of the State depending for its existence and performing its functions subject to the control and direction of the State. "It has long been settled by Federal decisions that such powers are not protected by the due process clause of the Fourteenth Amendment to the Federal Constitution."

B. *No federal question is presented.*

The mere allegation of the existence of a federal question neither creates one nor suffices to give this Court appellate jurisdiction. *Equitable Life Assurance Society of the United States v. Brown*, 187 U. S. 308.

What is the federal question which appellant asserts? Throughout the Jurisdictional Statement this question is begged by merely asserting denial of equal protection of the laws and of due process. The only indication of a definition is in the reference (J. St. 4) to "an arbitrarily and unreasonably constituted class of insureds called self-raters". If there is a federal question, therefore, it must be one involving the creation of an unreasonable classification. And if this is the question, the record reveals it to be one of totally hindsighted fabrication.

Certainly the Arizona Supreme Court's rejection of appellant's claims by holding that the appellees paid the rates called for under the contract does not present

that or any other federal question. Nor does appellant's assertion that by the court's construction of the statute the Commission was given "totally unbridled discretion to charge or not to charge" the self raters for basic costs present any question. To this assertion the court replied quite clearly in its Opinion on Rehearing (J. St. 18a):

> "The Commission does not have unbridled discretion to charge or not to charge at will for basic costs. It 'shall' provide for a rate 'to meet' the specified items and hence is manifestly prohibited from establishing a rate which will not meet the basic costs of the self-raters.".

Appellees respectfully submit that, on the record before the Court, there just is no federal question presented. Appellant tries to create one by changing on appeal the entire theory upon which its actions were presented and decided. Suffice it to say, in the first place, that the record will not support the revised theory and, secondly, that the belated switch violates a principle well established by this Court. *Virginia Railway Company v. A. J. Mullins,* 217 U. S. 220.

II. The Alleged Federal Question Was Not Timely and Properly Raised

After five years of litigation appellant first attempted to inject a federal question into the case in its final move before the Arizona Supreme Court, i.e., in the filing of its Amended Motion for Rehearing. This was clearly in violation of the Arizona Procedural Rules. (Rule 5(c), Rules of the Supreme Court of Arizona). Appellant concedes that the Arizona Supreme Court did not decide its belated claims of un-

constitutionality (J. St. 21). The posture, therefore, of the asserted federal question is such as to require dismissal of the appeal. *Herndon v. Georgia*, 295 U. S. 441.

Appellant obviously recognizes this situation but attempts to bring itself within the exception set forth in *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313. The *Gehner* exception, however, is an extremely narrow one. There is no analogy whatsoever between the situation in the instant case and that in *Gehner*.

The *Gehner* exception is predicated entirely upon surprise. The case holds that when a federal question is first brought into the case by a state supreme court's decision which appellant was not reasonably bound to have anticipated, it is sufficiently "drawn in question", even though first raised in a petition for rehearing. Although appellant in *Gehner* sought a construction of a statute, it did not seek a construction on the precise issue as to whether or not its United States bonds were taxable. No one had ever contended that such bonds were taxable. Such issue presenting the federal question in that case did not arise until the state supreme court ruled imposing a tax on said bonds.

In contrast to *Gehner*, the express issue before the Arizona Supreme Court and the issue on which it ruled was whether or not the rates collected from the self raters for basic costs and employer's liability coverage were required under the self rating statute and self rating policy to be based upon the rates paid by general class policyholders. Appellees contended that the

long-standing practice[13] of the Commission in determining such rates in accordance with its self-rating plan was correct. It was over this precise issue that the battle was fought at all stages of the proceeding, i.e., before the Superior Court, the Commission, and the Arizona Supreme Court.

The issue as it concerned appellant's basic costs claim[14] was resolved by the Arizona Supreme Court's adoption of appellees' position that the experience rating plan was a part of the self rater policy, and that the premium for basic costs was subject to modification in accordance therewith and not required to be based on manual rates of general class policyholders.[15] On the portion of the issue involving the Employer's Liability Act Coverage Claim, the court held that the general class policyholder rates urged by appellant were clearly inapplicable and not a part of the contract between the Commission and the self rates. (J. St. 15a). This holding was in accord with appellees' contention[16]

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13 Such practice commenced with the adoption of the Plan in 1926 (See interpretation of self-rating plan in *Industrial Commission v. Arizona Power Company*, 37 Ariz. 425, 295 Pac. 305) and has continued for over three decades. (227, 238-239) Cf. *Herndon v. Georgia*, 295 U. S. 441.

14 See *supra*, p. 4, for a more complete statement of appellant's basic costs claim.

15 This holding was foreshadowed by the holdings in the proceedings before the Maricopa County Superior Court and the Commission. See Memorandum Opinion (J. St. 23a) wherein Judge Bernstein states: "The court has examined carefully Section 56-923 [ARS § 23-983E] and finds that the Commission is specifically authorized and, therefore, has jurisdiction to establish a self-rating plan and fix rates and charges therefor, separate and distinct from those set for the general class policyholders." See also Commission holding. (247).

16 See footnote 7, p. 5, *supra*. "The rates which are applicable to the self-rater policy are the rates determined and fixed by the Commission pursuant to its *experience rating plan*." (A. B. 14)

and the finding by the Commission that the rates relied upon by appellant were not a part of the self rater contract. (242, 243) (A. B. 14).

Thus it is quite clear that the decision of the Arizona Supreme Court involved only the specific issue presented to it by appellant. This issue was decided in favor of appellees in accordance with contentions urged by appellees throughout five years of litigation.

To say that under these circumstances appellant was not forewarned and could not reasonably have anticipated such a result, is incredible. It is as much as to say that it never could have been reasonably anticipated that appellant's contentions in these actions would not prevail. What appellant actually requires and seeks by asking the Court to review this case is the enunciation of an entirely new and startling "surprise" doctrine, i.e., that a litigant is not reasonably bound to anticipate a decision against him and, may therefore, in every instance of an adverse decision by the state supreme court thereafter and for the first time raise his federal constitutional claim. If a federal question exists in this case as a result of the Arizona Supreme Court's construction of the statute and the Industrial Commission's administration of it, as now belatedly claimed by appellant, surely that question existed just as much at the time appellant filed its original action as it did when the Arizona Supreme Court rendered it decision. As stated by the Arizona Supreme Court "appellant has had its day in court, and a full day, indeed. Justice neither requires nor permits of more than this." (J. St. 17a).

III. The Judgment Rests On An Adequate Non-Federal Basis

A. *The state court's application of estoppel furnishes an adequate non-federal basis for judgment.*

Even if it is assumed that the appeal presents a substantial federal question, and that the federal question was timely and properly raised, still this appeal must be dismissed because the judgment rests on an adequate non-federal basis.

When a state court's refusal to consider federal constitutional questions is based upon estoppel, the judgment rests on an adequate non-federal basis and an appeal to the United States Supreme Court must be dismissed. *Utley v. City of St. Petersburg, Florida,* 292 U. S. 106; *Enterprise Irrigation District v. Farmers' Mutual Canal Company,* 243 U. S. 157; *Hale v. Lewis,* 181 U. S. 473; *McSweeney v. Equitable Trust Co.,* 315 U. S. 785; *Twin Falls County, State of Idaho v. Henderson,* 305 U. S. 568; *Southern Nebraska Power Company v. Nebraska ex rel. Sorenson,* 299 U. S. 520; *Eustis v. Bolles,* 150 U. S. 361.

Appellant states that federal law determines "who" may raise a federal question. In considering the question of estoppel the issue involved is not "who" may raise a constitutional objection in the first instance, but, rather, whether or not a party having that right might lose it by his conduct or inaction. The resolution of that question involves an application of state law and the decision of the state court thereon furnishes on adequate non-federal basis for the decision. The decision in *International Steel & Iron Company v.*

National Surety Co., 297 U. S. 657 (cited J. St. 22) can furnish little comfort to appellant. There, not only was the factual situation completely different from that in the instant case but, in addition, the estoppel question was neither raised nor considered in the state court. Rather, the constitutional question was decided on the merits. On appeal, the United States Supreme Court recognized that if the defense of estoppel had been raised and considered in the state court, and held to be present, such holding would have furnished an adequate non-federal basis sufficient to support the decision.

As indicated previously, these being derivative or secondary actions, appellant's rights can rise no higher than and must be governed by the rights of the Commission. Therefore, if the Commission is estopped, appellant is estopped.

Here are the facts which were before the Arizona Supreme Court when it applied the estoppel: The Commission during the years in question had acted under the statute by entering into contracts pursuant thereto insuring the self raters. The Commission received benefits under these contracts in the form of premiums (22, 26). The self raters relied upon their policies and paid the premiums called for by their contract. (J. St. 17a). If the Commission were allowed to reverse its position retroactively and adopt the theory of appellant, the self rates would be prejudiced by their reliance upon the acts of the Commission in issuing policies and collecting premiums thereon in accordance with its, the Commission's, interpretation of the statute. Certainly the Commission by its prior conduct

has invoked the provisions of the self rater statute, has availed itself of its terms, and has been an actor thereunder to such an extent that it cannot now be allowed to deny the contracts it made pursuant thereto.

The Arizona court's decision invoking estoppel was based upon substantial grounds. Under such circumstances, as stated in *Enterprise Irrigation District v. Farmers' Mutual Canal Company*, 243 U. S. 157, this Court is "not at liberty to inquire whether it is right or wrong, but must accept it, as * * * [it accepts] other state decisions of non-federal questions."

B. *The state court's ruling that ARS § 23-946 provides the exclusive remedy for obtaining a judicial review of administrative actions of The Industrial Commission furnishes an adequate non-federal basis for judgment.*

Assuming, gain *arguendo* that a substantial federal question is presented and has been timely and properly raised for review by this Court, even so the appeal should be dismissed because the judgment rests on still another adequate non-federal basis, namely, appellant's failure to avail itself of the exclusive state remedy.

The Arizona Supreme Court did not pass upon any alleged federal question involving the Industrial Commission's administrative application of the self rater statute (ARS § 23-983E) on the grounds that ARS § 23-946 provided a method for obtaining judicial review of administrative action, and that such method was *exclusive* (J. St. 16a, 18a).

Appellant's argument (J. St. 24-26) recognizes that exhaustion of state remedies is a prerequisite to an appeal to this Court, but appellant contends the state remedy is inadequate. Appellant's contention in this regard is specifically directed toward the Commission's action in fixing self rater premium rates for the years 1948 through 1953. A look at the appropriate statutes quickly disposes of appellant's contention. ARS § 23-945 provides that any person aggrieved by an order of the Commission may obtain a hearing before the Commission; ARS § 23-946 provides for a judicial review of a Commission order after a hearing before the Commission; ARS § 23-948 provides for an appeal from the Superior Court to the State Supreme Court.

If appellant is now unable to obtain a judicial review of the 1948-53 rates, it is not because the remedy is inadequate but solely because appellant did not make a *timely* attempt to review the rates for any of those years in the manner required under ARS §§ 23-945 and 23-946[17]. In other words, appellant has lost its right to a review of the 1948-53 rates by neglecting to avail itself of the adequate state remedy[18].

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17 Although appellant's petition for hearing before the Commission was filed on April 28, 1955, following the Commission order of April 1, 1955, fixing a new formula for premium rates for 1954, it is affirmatively alleged in the complaint that appellant was fully aware of the matters of which it complained at least as far back as 1952 (4, 5).

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18 This clearly was the conclusion reached by the Superior Court as is shown by its Memorandum Opinion limiting the Fourth Cause of Action to review of the 1954 rate order, and by the following statement appearing in the Memorandum Opinion under the Second Cause of Action:
"Nowhere does it appear that plaintiff petitioned the Industrial Commission, pursuant to Secs. 23-945 et seq., ARS 1956 (or the applicable statutes in effect prior to the adoption of the 1956 Code), to determine the reasonableness or lawfulness of prior orders fixing such rates, except by a petition filed on April 27, 1955, after the Commission had issued its order fixing said rates for the year 1954." (J. St. 32a, 36a)

In affirming the judgement of the Superior Court with respect to the Fourth Cause of Action, the Arizona Supreme Court has impliedly, if not expressly, so held. Such holding is consistent with the previous decisions of the Arizona Supreme Court with respect to attacks on orders of the Industrial Commission. *Industrial Commission v. J. & J. Const. Co.*, 31 Ariz. 224, 231 P. 2d 762; *O'Neil v. Industrial Furnaces, Inc.*, 72 Ariz. 149, 231 P. 2d 768; *Holmes v. Osborne*, 57 Ariz. 522, 115 P. 2d 775. There is nothing novel in such theory, and the Arizona court's decision with respect to local statutes is binding upon this Court. *Utely v. St. Petersburg, Florida*, 292 U. S. 106; *First National Bank of Greeley v. Board of County Commissioners of the County of Weld*, 264 U. S. 450; *Bass v. Milledgville*, 295 U. S. 721.

Appellant's arguments (J. St. 24, 25) that a petition to the Commission would have resulted in an adverse decision, and that the Commission cannot render judgment for monies due the Fund, are frivolous. With reference to the first point, the state remedy does not end with a hearing before the Commission. This is evidenced in the instant case by the fact that appellant still has pending before the Superior Court an action for judicial review of the 1954 rates. As to the second point, the Commission, under ARS § 23-929, may cause actions to be initiated to collect any monies due the Compensation Fund. Accordingly, if appellant had invoked and pursued its state remedy and this had resulted in new rates being established, the Commission, if necessary, could have initiated actions to collect the premiums due the Compensation Fund.

It is clear that the statutes of Arizona have at all times provided an adequate remedy to protect appellant against any alleged arbitrary and capricious acts of the Industrial Commission. The refusal of the Arizona Supreme Court to consider appellant's objection with respect to Commission action rested upon an adequate non-federal basis. *Mellan Co. v. McCafferty*, 329 U. S. 134; *Copperweld Steel Company v. Industrial Commission of Ohio*, 324 U. S. 779; *Phyle v. Duffy*, 334 U. S. 862.

CONCLUSION

For the reasons and upon the grounds set forth herein Appellees respectfully submit that the appeal should be dismissed.

Respectfully submitted,

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APPENDIX

Text of Arizona Statutes Cited in Appellees' Motion to Dismiss

ARS §23-929 (formerly §56-969, A.C.A., 1939)

"Upon request of the commission the attorney general, or under his direction the county attorney of the proper county, shall institute and prosecute the necessary actions or proceedings for the enforcement of the provisions of this chapter, or for recovery of money due the state compensation fund or accident benefit fund, or for any penalty provided for in this chapter, and shall prosecute or defend all actions or proceedings brought by or against the commission, or the members thereof in their official capacity. The commission may compromise any action brought under this chapter."

ARS §23-945 (formerly §56-908 A.C.A., 1939)

"A. Any employer or other person interested in or affected by an order of the commission may petition for a hearing on the reasonableness and lawfulness of such order by a verified petition filed with the commission. The petition shall set forth specifically and in detail the order upon which a hearing is desired, the reasons why the order is unreasonable or unlawful and the issue to be considered by the commission on the hearing. Objections other than those set forth in the petition are deemed finally waived.

B. Upon receipt of the petition, if the issue raised in the petition has theretofore been adequately considered, the commission shall confirm, without hearing, its previous determination. If a hearing is necessary to determine the issue raised, the commission shall order a hearing thereon at such time as it prescribes. Notice of the time and place of hearing shall be given the petitioner and such other persons as the commission finds directly interested in the decision.

C. Upon the hearing, if it is found that the order complained of is unlawful or unreasonable, the commission shall substitute therefor a reasonable and lawful order, and may grant further time reasonably necessary for compliance with its order."

ARS §23-946 (formerly §56-909 in part, §56-914, A.C.A., 1939)

"A. Any person in interest dissatisfied with an order of the commission may commence an action in the superior court of the county where the property, plant or place of employment affected by the order is located against the commission as defendant to set aside, vacate or amend the order, on the ground that the order is unreasonable or unlawful, and the superior court shall have exclusive jurisdiction thereof. The commission shall be served with summons as in civil actions.

B. The answer of the commission shall be filed within ten days after service of summons upon it. The commission shall file with the answer a certified transcript of its record in the matter, whereupon the action shall be at issue and shall be advanced for trial by the

court upon application of either party to the earliest possible date.

C. No action or proceeding to set aside, amend or enjoin enforcement of an order of the commission shall be brought unless the petitioner has applied to the commission for a hearing thereon as provided by §23-945 and in such petition has raised every issue in the action."

ARS §23-947 (formerly §56-915 A.C.A., 1939)

"A. If upon the trial provided for in §23-946, it appears that all issues arising in the action have not theretofore been presented to the commission in the petition for a hearing as to the reasonableness and lawfulness of the order, or that the commission has not had ample opportunity to hear and determine the issued raised in the action, or has not in fact heard and determined the issues raised, the court shall, before rendering judgment, unless the parties stipulate to the contrary, transmit to the commission a full statement of such issues not adequately considered, and shall stay further proceedings in the action for fifteen days from the date of the transmission, and may thereafter grant such further stay as is necessary.

B. Upon receipt of the statement from the court as provided in subsection A, the commission shall consider the issues not theretofore considered, and may alter, modify, amend or rescind its order complained of, and shall, within ten days from receipt of the statement, report its order thereon to the court. The court shall thereupon order the pleading to be amended to

raise the issues resulting from the alteration, modification, amendment or rescission of the commission's order, and thereafter proceed as in other civil actions."

ARS §23-948 (formerly §56-916 A.C.A., 1939)

"No court of this state, except the superior court and the supreme court on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any order of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its duties, but a writ of mandamus may issue from the supreme court to the commission in proper cases, and an appeal may be taken from the superior court to the supreme court in all cases.".

ARS §23-983 (formerly §56-923 in part, A.C.A., 1939)

"A. The state compensation fund shall be neither more nor less than self-supporting.

B. Employments affected by the provisions of this chapter shall be divided by the commission for the purpose of the state compensation fund into classes whose rates may be readjusted at times the commission determines. The commission may rearrange the classes by withdrawing any employment embraced in one class and transferring it wholly or in part to another class. Separate accounts shall be kept of the amounts collected and expended in each class for rate determination purposes, but for the payment of compensation and dividends the fund shall be one and indivisible.

C. The commission shall determine the hazards of the different classes of occupations or industries, fix

the premiums therefor at the lowest rate consistent with the maintenance of a solvent compensation fund and the creation of a surplus and reserves, and may adopt a system of schedule rating in a manner to take account of the peculiar hazard of each individual risk.

D. The commission, in fixing rates, shall provide for expenses of administering the fund, disbursements on accounts of injuries and deaths of employees in each class, an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, reserves adequate to carry the class to maturity and other necessary reserves and surplus determined by the commission. The amount of surplus and reserves shall be determined by the commission, but the catastrophe reserve shall not be less than one hundred thousand dollars.

E. The commission may in its discretion endorse on any of its regularly issued policies a self-rating plan, and may apply tentative rates, subject to modification in accordance with the loss experience of such risks, and shall provide for a carrying charge, premium tax and a rate for creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses to be fixed by the commission."

ARS §23-986 (formerly §56-924, A.C.A., 1939)

"Annually, within six months after the close of each fiscal year, if there exists in the state compensation fund an excess of assets over liabilities and a reasonable surplus, such liabilities to include the necessary reserves including the catastrophe reserve, and such

excess may be safely divided, the commission shall declare a dividend in such method or manner as the rules and regulations of the commission provide to those employers who have paid premiums into the state compensation fund and accident benefit fund in excess of liabilities chargeable to them in those funds for that year. In determining the amount or proportion of the balance to which employers are entitled as dividends, the commission shall give consideration to the prior paid premiums and accident experience of each individual employer during the dividend year."

Rule 5(c), Rules of the Supreme Court of Arizona

"1. Assignments of error shall distinctly specify each ground of error relied upon and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for new trial, with other rulings, or in any motion, or in a statement of facts, or otherwise in the record, it shall nevertheless be referred to in the assignments of error, or it will be deemed waived.

2. If the error assigned is that the court overruled a motion for new trial and the motion was based on more than one ground, the assignment of error will not be considered as distinct and specific by this court unless each ground is specially and distinctly stated in the assignment of error.

3. An objection to the ruling or action of the trial court will be deemed waived in this court unless it has been assigned as error in the manner provided by this Rule.

4. If the error assigned is the giving of instructions to the jury by the trial court, the appellant shall set forth in his statement of the law applicable to the case or to any particular fact or facts in the case, specifically in what way the instruction complained of is erroneous.

5. If the refusal to give an instruction requested by appellant in the trial court is assigned as error, the assignment shall state the applicability of such instruction to a fact or facts in the case.

6. The assignments of error may only be amended by leave of court and upon such terms as this court prescribes."